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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1138

Filed: 1 August 2017

Pitt County, No. 14 CVS 2381

EMERALD PLACE DEVELOPMENT PROPERTIES, LLC, Plaintiff

v.

STEPHEN F. HORNE, III, ADMINISTRATOR OF THE ESTATE OF STEPHEN F. HORNE, II, DECEASED; STEPHEN F. HORNE, III; STEPHEN F. HORNE, II PA; HORNE & HORNE, PLLC; WILLIAM F. HILL; AND WILLIAM F. HILL, PA, Defendants

Appeal by plaintiff from order entered 25 July 2016 by Judge Richard L. Doughton in Pitt County Superior Court. Heard in the Court of Appeals 22 March 2017.

*Law Offices of T. Greg Doucette PLLC, by T. Greg Doucette, for plaintiff-appellant.*

*Patterson Dilthey, LLP, by Ronald C. Dilthey, for defendant-appellees.*

CALABRIA, Judge.

Emerald Place Development Properties, LLC (“plaintiff”) appeals from the trial court’s order granting summary judgment in favor of the Estate of Stephen F. Horne, II; Stephen F. Horne, III; Stephen F. Horne, II PA; and Horne & Horne, PLLC (collectively, “the Horne defendants”) and dismissing plaintiff’s action. Since plaintiff

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settled the breach of contract claim underlying its legal malpractice action against the Horne defendants, the election of remedies doctrine precludes further recovery in this case. We affirm the trial court's order.

**I. Background**

Plaintiff owns and operates the Emerald Place Professional Center, an office complex located in Greenville, North Carolina. On 12 November 2001, plaintiff entered into a written lease agreement with William F. Hill and William F. Hill, PA (collectively, "the Hill defendants"). The agreement provided that the Hill defendants would lease 2,994 square feet of office space for a term of five years, with rent payable monthly to plaintiff. The lease's final clause, appearing just above the parties' signatures, provided:

22. IN WITNESS WHEREOF. The parties have set their hands and seals on the day and year first above written.

Despite this clause, no actual seal appeared on the document until 19 November 2001, when a notary public witnessed the parties' signatures and affixed her official seals to the document.

In April 2006, the Hill defendants breached the lease agreement. At that time, they owed plaintiff a principal balance in the amount of \$42,281.76 with interest accruing monthly. Plaintiff retained the Horne defendants to pursue a breach of contract claim against the Hill defendants.

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On 5 May 2006, the Horne defendants filed a complaint against the Hill defendants in Pitt County Superior Court alleging breach of contract. However, the Horne defendants never served the Hill defendants with a summons or a copy of the complaint, the action was discontinued, and plaintiff was never informed about the status of the action. When plaintiff emailed the Horne defendants on 23 October 2006 to inquire about its status, defendant Horne II responded:

As I told [one of plaintiff's officers] last week, this is a Superior Court case. They can take 1 to 3 years to actually get it heard. There are only about six terms of that court each year and depending upon what gets tried, sometimes only one case gets heard. I have been second on the calendar and not gotten reached. Occasionally, you can be way down the calendar and get it heard. It just is no exact way to tell.

Over the next six years, plaintiff periodically inquired about the status of the action. The Horne defendants repeatedly misrepresented that the action was being pursued.

In May 2012, the Horne defendants informed plaintiff that a new lawsuit would need to be filed against the Hill defendants. On 13 June 2012, the Horne defendants filed a second complaint, purportedly seeking "Money Owed." However, as with the first action, the Hill defendants were never served with a summons or a copy of the complaint. When the second action was discontinued on 12 October 2012, plaintiff was not informed.

On 25 February 2014, plaintiff emailed the Horne defendants requesting another update on the action. In addition, plaintiff requested that the Horne

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defendants file a lien against another tenant for delinquent common area maintenance (“CAM”) fees. The following day, defendant Horne II replied, “Lien is filed in the amount of [\$]5,062.50. That is dues from 01-01-2013 through 01-01-2014 plus interest at 18%. I have also asked for attorney fees. . . . Still woking [sic] on [mediation] dates with Bill Hill.” According to plaintiff, no lien was ever filed in Pitt County.

On 16 September 2014, plaintiff filed a verified complaint against the Horne defendants, alleging claims for legal malpractice; fraud; negligent misrepresentation; civil conspiracy; and unfair and deceptive acts or practices pursuant to N.C. Gen. Stat. § 75-1.1 (2015). On 24 November 2014, the Horne defendants moved to dismiss the action pursuant to N.C. Gen. Stat. § 1A-1, Rule12(b), on the grounds that, *inter alia*:

the Lease Agreement . . . forming the basis for the causes of action in the Complaints . . . was signed and executed under seal on November 12, 2001; that the alleged breach of the Lease Agreement occurred on April 6, 2006 . . . ; that the statute of limitations for the breach of a sealed instrument is ten years under N.C. Gen. Stat. § 1-47(2). Any claim for breach of the Lease Agreement is still open and available to Plaintiff under N.C. Gen. Stat. § 1-47(2).

Based on this argument, on 5 March 2015, plaintiff filed a motion for leave to amend its complaint to join the Hill defendants as parties to the action, pursuant to N.C. Gen. Stat. § 1A-1, Rules 15 and 19.

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Following a hearing, on 10 April 2015, the trial court entered an order (1) denying the Horne defendants' motions to dismiss, and (2) granting plaintiff's motion for leave to amend the complaint. On 21 April 2015, plaintiff filed an amended complaint against all defendants. In addition to the original claims asserted against the Horne defendants, the amended complaint also included a breach of contract claim against the Hill defendants, which plaintiff asserted "[i]n the alternative, to the extent th[e] Court concludes the Lease Agreement entered into between Plaintiff and the Hill Defendants is a 'sealed instrument' subject to a ten-year statute of limitations[.]"

After answering plaintiff's amended complaint and conducting depositions, on 4 April 2016, the Horne defendants filed motions for summary judgment. On 6 June 2016, prior to the calendared hearing, plaintiff reached a settlement with the Hill defendants and voluntarily dismissed all claims against them. The settlement agreement "specifically exclude[d]" the Horne defendants from its terms. The trial court granted a continuance to allow the parties to brief the issue of whether plaintiff's settlement with the Hill defendants precluded their recovery from the Horne defendants.<sup>1</sup>

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<sup>1</sup> Defendant Horne II died intestate on 28 June 2016. Defendant Horne III, acting as administrator of his father's estate, moved that the estate be substituted as defendant. On 25 July 2016, the trial court entered an order allowing the motion.

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On 25 July 2016, the trial court held a second summary judgment hearing. Following arguments from both parties, the trial court determined that there were no genuine issues as to any material facts and granted the Horne defendants' motions for summary judgment. Plaintiff appeals.

**II. Analysis**

We review *de novo* the trial court's order granting summary judgment. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "[S]uch judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (citation and quotation marks omitted).

On appeal, the dispositive issue is whether plaintiff's claims against the Horne defendants are barred by the election of remedies doctrine. "North Carolina courts have long recognized and applied" this doctrine, which "is founded on the principle that where by law or by contract there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 19, 591 S.E.2d 870, 882-83 (2004) (citations and quotation marks omitted). "A party cannot, either in the course of litigation or in dealing *in pais*, occupy inconsistent positions. But the doctrine of election applies only where two or more existing remedies are alternative and inconsistent. If the remedies are not inconsistent, there is no ground

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for election.” *Douglas v. Parks*, 68 N.C. App. 496, 498, 315 S.E.2d 84, 85 (citation omitted), *disc. review denied*, 311 N.C. 754, 321 S.E.2d 131 (1984).

The purpose of the election of remedies doctrine is “to prevent double redress for a single wrong.” *Id.* Consequently, the doctrine may bar a plaintiff who successfully settles a claim in spite of the prosecuting attorney’s negligence from later recovering for legal malpractice. *Id.* at 499, 315 S.E.2d at 86. This Court has explained that

if a party contends that he or she was deprived of a legal claim because of the action of another and he pursues the claim against the original defendant he cannot then make a claim against the party he says caused him to lose all or part of the original claim. *This is so even if the settlement the plaintiff is able to make on the original claim is not as good as it would have been if there had been no wrongful action by the third party.*

*Stewart v. Herring*, 80 N.C. App. 529, 531, 342 S.E.2d 566, 567 (1986) (emphasis added) (holding that “[b]y pursuing her claim for alimony against her husband the plaintiff lost her right to make a claim against the defendant for his negligence in representing the plaintiff in her original alimony claim”).

In the instant case, plaintiff’s damages arise from either (1) the Hill defendants’ breach of the lease agreement; or (2) the Horne defendants’ failure to

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prosecute plaintiff's breach of contract claim against the Hill defendants.<sup>2</sup> Plaintiff's counsel conceded this point at the 6 June 2016 motions hearing:

Essentially, the cause of action as to Bill Hill was argued in the alternative, based on whether or not the document at issue was a sealed instrument. If it was a sealed instrument, everything against the Hornes would go away. We stipulated to that. If it was not a sealed instrument, everything against Hill would go away. And we pled that even though the causes for relief says hold the defendants jointly and severally liable, that is based on the fact that there was a cause of action pled in the alternative.

On 6 June 2016, plaintiff and the Hill defendants executed a "Settlement Agreement and Mutual General Release of All Claims." The Hill defendants agreed to pay plaintiff "[f]orty (40) equal monthly payments of \$375.00 USD"; in exchange, plaintiff agreed that "all claims made against the [Hill d]efendants in the lawsuit shall be dismissed with prejudice[.]" Although the Horne defendants were "specifically exclude[d]" from the agreement's terms, plaintiff's settlement with the Hill defendants nevertheless eliminated plaintiff's damages as to the Horne defendants, thereby precluding further recovery from them. *See id.*

Plaintiff contends that the Horne defendants "are entitled to an offset – not summary judgment – as a result of the Hill settlement," based on this Court's holding in *Swain v. Leahy*, 111 N.C. App. 884, 433 S.E.2d 460, *disc. review denied*, 335 N.C.

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<sup>2</sup> The complaint also alleges damages based on the Horne defendants' failure to file a lien against another tenant for delinquent CAM fees. However, plaintiff's brief contains no mention of such damages. Furthermore, one of plaintiff's member managers, Dr. Gary Gene Leonhardt, testified that those fees were eventually collected.

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242, 439 S.E.2d 162 (1993). However, that case is distinguishable. The *Swain* plaintiff, a North Carolina resident, was injured in a car accident in Virginia in April of 1985. 111 N.C. App. at 885, 433 S.E.2d at 460. She hired the defendant-law firm to bring a personal injury action against the other car's driver, who was a Virginia resident. *Id.* at 885, 443 S.E.2d at 461. In April of 1988, the defendant-law firm filed an action against the Virginia driver in North Carolina court, but the claim was dismissed for lack of personal jurisdiction. *Id.* By that time, however, it was too late for the plaintiff to bring an action in Virginia, where the two-year statute of limitations had already expired. *Id.*

At the advice of the defendant-law firm, the plaintiff hired another attorney to file a new action in North Carolina against the owner and driver of the car in which she had been injured. *Id.* After the claim was filed, the plaintiff accepted a settlement offer and executed a general release. *Id.* The plaintiff then filed a professional malpractice action against the defendant-law firm, alleging negligence in its representation of her claim against the Virginia driver. *Id.* The law firm asserted the election of remedies doctrine as an affirmative defense, and the trial court granted the firm's motion for summary judgment. *Id.* at 885-86, 443 S.E.2d at 461.

On appeal, this Court held that "the doctrine of election of remedies [wa]s not applicable under the facts of th[e] case." *Id.* at 887, 443 S.E.2d at 462. We explained that the plaintiff was free to pursue separate actions against each of the three original

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tortfeasors pursuant to N.C. Gen. Stat. § 1A-1, Rule 20, and in doing so, she did “not pursue inconsistent claims”:

Unless and until plaintiff receives full satisfaction of a claim, settlement against two of three joint tortfeasors would not bar a claim against the remaining offender. Plaintiff in this case had cumulative, not inconsistent, remedies. Plaintiff initially had claims against all three joint tortfeasors. Theoretically, settlement with two tortfeasors would not bar a claim against the third. Any judgment subsequently obtained against the third would be reduced by the amount received in settlement. Due to defendants’ alleged negligence, however, plaintiff has lost the right to pursue the remaining tortfeasor in this case. We hold that plaintiff may pursue a malpractice action against defendants for the loss of this claim.

*Id.* at 886-87, 443 S.E.2d at 462. Furthermore, we rejected the defendant-law firm’s argument that the plaintiff’s execution of a general release “constituted an election of remedies because it settled all claims arising out of the accident.” *Id.* at 887, 443 S.E.2d at 462. Because the plaintiff “did not sign the release discharging other claims until after her claim against [the Virginia driver] had already been barred by the statute of limitations[,]” we concluded that she “could not have released a claim she was already precluded from bringing by defendants’ negligence.” *Id.*

The same cannot be said here. According to the amended complaint, plaintiff asserted the breach of contract claim against the Hill defendants “[i]n the alternative, to the extent th[e] Court concludes the Lease Agreement . . . is a ‘sealed instrument’ subject to a ten-year statute of limitations[.]” On 6 June 2016, plaintiff opted to settle

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with the Hill defendants prior to the trial court's determination of the relevant statute of limitations. Nevertheless, plaintiff now contends that the lease agreement was *not* actually a sealed instrument, and the Horne defendants thus missed N.C. Gen. Stat. § 1-52's three-year statute of limitations on plaintiff's breach of contract claim against the Hill defendants. It is precisely this type of "double redress" that the election of remedies doctrine aims to prevent. *Douglas*, 68 N.C. App. at 498, 315 S.E.2d at 85.

"[P]laintiff had the election to either rescind or affirm the settlement" with the Hill defendants. *Id.* at 499, 315 S.E.2d at 86. Plaintiff elected to affirm it, and such "election precludes a malpractice action against" the Horne defendants. *Id.* Accordingly, we need not address any of the parties' remaining arguments. The trial court's order granting the Horne defendants' motion for summary judgment is affirmed.

AFFIRMED.

Judges HUNTER, JR. and BERGER concur.

Report per Rule 30(e).